143

No. 09-363

Supreme Court, U.S.
FILED
OCT 28 2009
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

KEVIN COOPER, *Petitioner,*

v.

ROBERT K. WONG, ACTING WARDEN, SAN QUENTIN STATE PRISON, SAN QUENTIN, CALIFORNIA, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

EDMUND G. BROWN JR.
Attorney General of California

DONALD E. DENICOLA
Deputy State Solicitor General

DANE R. GILLETTE
Chief Assistant Attorney General

GARY W. SCHONS
Senior Assistant Attorney General

RONALD S. MATTHIAS
Senior Assistant Attorney General

HOLLY D. WILKENS
Supervising Deputy Attorney General
Counsel of Record

110 West A Street, Suite 1100
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-2197
Fax: (619) 645-2191

Counsel for Respondent

CAPITAL CASE

QUESTIONS PRESENTED

1. Does the execution of a condemned inmate violate the Eighth Amendment when the inmate's guilt has been confirmed by post-conviction DNA test results, and his actual-innocence claim is refuted by the factual findings of every state and federal court to consider it?

2. When considering an actual-innocence claim, is a district court required to ignore established standards for conducting post-conviction discovery and an evidentiary hearing in order to ensure that the hearing it provides is "full and fair"?

3. Must a federal habeas court determine whether 28 U.S.C. § 2244 supercedes the gateway standard for successive petitions articulated in *Schlup v. Delo*, 513 U.S. 298, 316 (1995), or whether there is an exception to both standards for claims alleging a violation of *Brady v. Maryland*, 373 U.S. 83 (1963), when the Petitioner cannot satisfy either the *Schlup* standard or § 2244(b) and the court reaches all of Petitioner's claims, including the *Brady* claims, on the merits?

TABLE OF CONTENTS

Page

STATEMENT 1
ARGUMENT 15
CONCLUSION 33

TABLE OF AUTHORITIES

Page

CASES

Brady v. Maryland
373 U.S. 83 (1963) 12, 16, 32

Calderon v. Thompson
523 U.S. 538 (1998) 23

Cooper v. Calderon
255 F.3d 1104 (9th Cir. 2001), *cert. denied*, 537 U.S. 861 (2002) 6

Cooper v. Calderon
274 F.3d 1270 (9th Cir. 2001) 7

Cooper v. Calderon
538 U.S. 984 (2003) 7, 9

Cooper v. California
528 U.S. 897 (1999) 7

Cooper v. California
540 U.S. 1172 (2004) 10, 11

Cooper v. Woodford
358 F.3d 1117 (9th Cir. 2004) 11, 12

Daubert v. Merrell Dow Pharmaceuticals, Inc.
509 U.S. 579 (1993) 13, 14

District Attorney for Third Judicial District v. Osbourne
___ U.S. ___, 129 S. Ct. 2308 (2009) 19, 30

Evans v. Smith
220 F.3d 306 (4th Cir. 2000) 32

Goldblum v. Klem
510 F.3d 204 (3rd Cir. 2007) 31

TABLE OF AUTHORITIES
(continued)

Page

Herrera v. Collins
506 U.S. 390 (1993) 16, 17, 18

House v. Bell
547 U.S. 518 (2006) ..... 16, *et passim*

In re Clark
5 Cal. 4th 750 (1993) 17

In re Cooper
538 U.S. 976 (2003) 9

In re Cooper
540 U.S. 808 (2003) 9

In re Davis
No. 08-1443, 2009 WL 2486475 (U.S., Aug. 17, 2009) .....
..... 16, 17, 18

Jordan v. Secretary of Dept. of Corrections
485 F.3d 1351 (11th Cir. 2007) 31

Knowles v. Mirzayance
___ U.S. ___, 129 S. Ct. 1411 (2009) 29

Lott v. Bagley
569 F.3d 547 (6th Cir. 2008) 32

Medina v. California
505 U.S. 437 (1992) 30

People v. Cooper
53 Cal. 3d 771, 809 P.2d 865, 281 Cal. Rptr. 90, *cert. denied*, 502 U.S. 1016 (1991) 6, 21, 27

Schlup v. Delo
513 U.S. 298 (1995) ..... 16, *et passim*

TABLE OF AUTHORITIES
(continued)

Page

Tompkins v. Secretary, Department of Corrections
557 F.3d 1257 (11th Cir. 2009) 32

STATUTES

28 U.S.C. § 2244 23

28 U.S.C. § 2244(b) ..... 16, *et passim*

Antiterrorism and Effective Death Penalty Act of 1996
("AEDPA") 23, 31

CONSTITUTIONAL PROVISIONS

United States Constitution
VIII Amendment 15

STATEMENT

Petitioner escaped from custody in Pennsylvania while awaiting trial on a number of criminal charges. While an escapee in October 1982, he kidnapped, raped, and then stole the car of a high school student who had interrupted him while he was burglarizing a home. Petitioner then fled to California and assumed the alias "David Trautman." Under that name, he was arrested, convicted, and sentenced to prison for a residential burglary in Los Angeles County. On April 29, 1983, Petitioner was sent to the California Institute for Men (CIM), a prison in Chino, California, for routine processing after sentencing. Because Petitioner's true identity (and criminal history) had not been discovered by CIM officials, Petitioner was transferred to a minimum-security portion of the prison on June 1, 1983. (I App. 53, 55, 79, 82.)

On the following afternoon, June 2, 1983, Petitioner escaped again — the twelfth time he had done so in his criminal career. Petitioner took refuge in a nearby lumber yard and, then, after nightfall, he made his way to a vacant house (the "hideout house") in a rural area of Chino. The hideout house was on a property adjacent to the ranch where Franklyn (Doug) Ryen and Peggy Ryen lived with their two children, 10-year-old Jessica and 8-year-old Joshua. The Ryen home was located 126 yards from the hideout house. On the night of June 4, 1983, the Ryens were away from their home attending a neighborhood barbecue. The Ryens — accompanied

by 11-year-old Christopher Hughes, whose parents had allowed him to spend the night at the Ryens' — returned home around 9:00 or 9:30 that night. (I App. 53-57, 64, 79.)

At some point before midnight, Petitioner entered the Ryens' home and brutally attacked the occupants with a hatchet, knife, and an ice-pick-like weapon. Doug sustained 37 wounds and a fractured skull. Peggy suffered 32 wounds, mostly to her head, neck, chest, stomach, and breasts. Jessica received 46 wounds, among them a deep V-shaped injury to her forehead and more than 20 carving injuries to her chest. Joshua suffered a hatchet wound to the top of his head, another near his left ear, and a stab wound to his throat. Christopher Hughes sustained 25 wounds to his head, chest, back, and arms — and one wound nearly severed his right hand. The bodies were found by Christopher's father around 11:30 a.m. the next morning on Sunday, June 5, 1983. Jessica was found lying in a hallway leading into the master bedroom. The others were inside the master bedroom. All were dead except for Joshua. (I App. 53, 59-65.)

Petitioner fled in the Ryen station wagon, which authorities found abandoned in Long Beach. On the floorboard of the vehicle was a unique brand of loose tobacco not available retail but provided free to CIM inmates. There were also two cigarette butts in the car. One was manufactured and the other was hand-rolled and contained the same unique tobacco. Saliva analysis of the two cigarette butts showed they were smoked by a "non-secretor." The ABO blood type of

the person who smoked the manufactured cigarette butt was determined to be type A. Petitioner's blood type is A. He is also a non-secretor, as is 20 percent of the population. A stain on the door-jam of the Ryen vehicle was human blood, type AB, consistent with Peggy and Jessica Ryen. A hair fragment found inside the vehicle was consistent with Petitioner's pubic hair. (I App. 74-76.)

Petitioner was charged with escape from a state prison, four counts of first degree murder, and one count of attempt to commit first degree murder. He admitted at trial that he had taken refuge in the hideout house. He could hardly deny it: his presence in the hideout house was established by the discovery of his fingerprint, footprint, and semen inside the home. The unique CIM-issued tobacco that Petitioner admitted possessing at the time of his escape from CIM was also found inside the hideout house. Petitioner, further, was found in possession of numerous items taken from the hideout house when he was subsequently arrested on July 30, 1983, in Santa Barbara County after attempting to rape a woman. Phone records and statements by Petitioner's former girlfriends placed him inside the hideout house trying to enlist help to get out of the area. At 8:27 p.m. the night of the murders, Petitioner hung up the phone after learning that none of his girlfriends would assist him. (I App. 67-69, 74, 78-80, 228-229.)

Other evidence tied Petitioner to both the hideout house and the Ryen home. A shoe print made by the same brand and model of shoe that

Petitioner admitted wearing at the time of his escape, in the same size as Petitioner's, was inside the hideout house. A shoe print from the same size, brand, and model shoe was on the spa cover outside the sliding glass door of the Ryen master bedroom, and a partial print in blood made by the same size, brand, and model shoe was on the bed sheet from the floor of the Ryen master bedroom.[1] The hatchet used in the murders at the Ryen home had been taken from the hideout house, where its sheath was left behind. Also missing from the hideout house were an eleven-inch hunting knife, buck knives, and ice picks capable of inflicting the injuries observed on the victims. Plant burrs found on the blanket Petitioner used at the hideout house were consistent with vegetation growing between the hideout house and the Ryen home, and with similar burrs found underneath Jessica's nightgown and in the Ryen station wagon. Also found in a plowed horse-training arena about midway between the two homes was a nearly empty can of beer. It was the same brand of beer as a six pack of beer in the Ryen refrigerator that had one can missing and another can hanging over the edge of a shelf with bloodstains on it. (I App. 56-59, 62, 71-72, 76-77, 80.)

Inside the Ryen home, there was a drop of blood on the wall of the hallway opposite the door to the master bedroom. The drop of blood was

---

[1] Petitioner's prison-issued shoes were never recovered. He testified at trial that he threw them and other prison-issued clothing into the ocean once he sailed into domestic waters after returning from Mexico. (I App. 80.)

tested and found to belong to an African-American male consistent with Petitioner's genetic profile. Dr. Blake, Petitioner's own expert, performed tests on the blood drop that he believed had the best chance of excluding Petitioner if he was not the donor. Tests could not exclude Petitioner as the donor, and additional testing included Petitioner among the possible donors. (I App. 72-73.)

Additional evidence showed that Petitioner returned to the hideout house to clean up after committing the murders at the Ryen home. Luminol testing of the shower stall and bathroom sink in the hideout house was positive, a result consistent with the presence of otherwise invisible blood residue. Positive luminol readings in the shape of foot impressions were also obtained on a carpet and in a closet. Hairs recovered from the drain trap in the bathroom sink were consistent with Jessica's, and a hair recovered from the shower drain was consistent with Doug's. A bloodstained rope was found in a closet and the blood was consistent with being a mixture of blood from either Jessica and Doug Ryen, or from Peggy and Doug Ryen. A blood-stained green khaki button on the floor of the hideout house was identical to those affixed to the prison-issued jacket Petitioner admitted he was wearing when he escaped from CIM. (I App. 69-71, 73-74.)

Despite the foregoing evidence tying Petitioner to the hideout house, to the Ryen house, and to the Ryen vehicle, Petitioner denied that he ever entered the Ryen house or station wagon. He claimed that he simply walked from the hideout house on the night of

the murders, occasionally stopping drivers for directions to Mexico. (I App. 79.)

Petitioner pled guilty to escape from a state prison and a jury found petitioner guilty of the remaining charges and sentenced him to death. The California Supreme Court affirmed the judgment, observing that the "sheer volume and consistency of the evidence is overwhelming." (I App. 44, 53; *People v. Cooper*, 53 Cal. 3d 771, 837, 809 P.2d 865, 281 Cal. Rptr. 90, *cert. denied*, 502 U.S. 1016 (1991).) On March 26, 1992, the first in a series of stays of execution was issued by the district court. More than 17 years of post-conviction challenges have followed. (I App. 44.)

The district court denied Petitioner's first habeas petition in 1997 after permitting it to be amended and supplemented, and after conducting an evidentiary hearing. (I App. 44-45; II App. 436, n.1.) The denial of Petitioner's first habeas petition was affirmed by the Court of Appeals for the Ninth Circuit, and rehearing and rehearing *en banc* was denied. (I. App. 47; II App. 436, n.1; *Cooper v. Calderon*, 255 F.3d 1104 (9th Cir. 2001), *cert. denied*, 537 U.S. 861 (2002).)

Petitioner filed a second petition for writ of habeas corpus in the district court on April 30, 1998. On June 15, 1998, the district court dismissed the petition for lack of jurisdiction and as an impermissible successive petition. (I App. 46.) Petitioner's second habeas petition was construed by the Ninth Circuit as an application to file a successive petition, and denied on December 21,

2001. (I App. 47; *Cooper v. Calderon*, 274 F.3d 1270 (9th Cir. 2001).) His petition for rehearing and rehearing *en banc* from the denial of his application was denied on October 18, 2002. This Court denied certiorari.[2] (I App. 47; *Cooper v. Calderon*, 538 U.S. 984 (2003)).

Petitioner's 1984-1985 trial having been conducted prior to the advent of DNA testing, the State in 2001 agreed to Petitioner's request for DNA testing in his effort to prove his alleged innocence. Petitioner, with the assistance of his post-affirmance counsel and two nationally- recognized DNA experts, entered into a joint agreement with the State to test evidence in the case. Petitioner's expert, Dr. Blake, identified the drop of blood from inside the Ryen home (Item A-41) and the two cigarette butts recovered from the stolen Ryen station wagon as "the most relevant biological evidence" in the case. The result from the agreed-upon post-conviction DNA testing further inculpated Petitioner, and confirmed the already overwhelming evidence of his guilt presented at his trial. The DNA testing confirmed the serology analysis from trial that placed Petitioner in the middle of the crime scene inside the Ryen home. The drop of blood (A-41) matched Petitioner's DNA profile, and the probability of a random match within the general population is 1 in 310 billion for African Americans, 1 in 270 billion for Caucasians,

---

[2] In the interim, Petitioner had filed a third petition for writ of certiorari with this Court challenging the denial of his third state habeas petition by the California Supreme Court. (I App. 47; *Cooper v. California*, 528 U.S. 897 (1999).)

and 1 in 340 billion for Western Hispanics. The DNA results on the cigarette butts confirmed Petitioner's presence in the Ryen station wagon to facilitate his escape from the area. The two cigarette butts found in the stolen Ryen station wagon contained DNA that matched Petitioner's profile, and the probability of a random match within the general population is 1 in 19 billion for African Americans, 1 in 11 billion for for Caucasians, and 1 in 15 billion for Western Hispanics for the manufactured cigarette butt, and 1 in 110 million for African-Americans, 1 in 16 million for Caucasians, and 1 in 12 million for Western Hispanics for the hand-rolled CIM-issued tobacco cigarette butt. (I App. 83-85, 121.)

Additionally, tests were conducted on the hatchet from the hideout house and T-shirt found two miles from the crime scene. The DNA test results from the hatchet confirmed that the blood was consistent with that of Petitioner's victims. The T-shirt — which was never used against Petitioner at trial — bore DNA consistent with that of both Petitioner and his victims. (I App. 85.)

Petitioner filed a second application in the Ninth Circuit for leave to file a successive habeas petition involving DNA testing and allegations of evidence tampering. The court denied the application in 2003, after finding that the DNA tests to which the State and Petitioner agreed do not exculpate Petitioner, that there were no newly-discovered facts establishing innocence, and that no prima facie case had been stated for relief based on asserted deficiencies in the DNA testing or

tampering allegations. (I. App. 48; II App. 436, n.1.) Petitioner's fifth petition for writ of certiorari challenging the denial of his application for leave to file a successive petition was denied in 2003. (I App. 49; *Cooper*, 538 U.S. 984.)

Petitioner filed a request in October 2002, in San Diego County Superior Court, for mitochondrial DNA testing of hairs, and in June 2003 he requested testing of the T-shirt, for purposes of showing tampering. The state trial court held an evidentiary hearing where original crime-scene criminalists and personnel from the San Bernardino County Sheriff's Department and the San Diego County Superior Court testified. San Diego County Superior Court Judge William H. Kennedy concluded that Petitioner had not made "any showing that law enforcement personnel tampered with or contaminated any evidence in his case." Petitioner's request for further testing was denied and the state trial court found no merit to Petitioner's allegations of evidence tampering. (I App. 49, 86; II App. 436, n.1.)

Petitioner also filed a petition for writ of habeas corpus in this Court on February 11, 2003, and a second petition for writ of habeas corpus in this Court on May 15, 2003. These petitions were denied on April 21, 2003, and October 6, 2003, respectively. (I App. 48-49; *In re Cooper*, 538 U.S. 976 (2003); *In re Cooper*, 540 U.S. 808 (2003).)

On December 17, 2003, the San Diego County Superior Court set an execution date of February 10, 2004. (I App. 50.) On January 20, 2004, Petitioner filed his sixth petition for writ of certiorari in this

Court challenging the denial of his fifth state habeas petition by the California Supreme Court and seeking a stay of his execution. This Court denied the petition and application for stay on February 9, 2004. (I App. 50; *Cooper v. California*, 540 U.S. 1172 (2004).)

Petitioner delayed nearly six months following the evidentiary hearing and denial of relief by the San Diego County Superior Court before filing his sixth petition for writ of habeas corpus in the California Supreme Court on February 2, 2004. The California Supreme Court denied his petition on its merits on February 5, 2004, and also found that it was procedurally barred. The court concluded: "As with the previous five petitions for writ of habeas corpus that petitioner has filed in this court challenging the judgment, this petition casts no doubt on petitioner's guilt or the validity of the judgment." On February 5, 2004, Petitioner filed a sixth volume of exhibits in support of the petition for writ of habeas corpus after the denial of his sixth state habeas petition. On February 6, 2004, the California Supreme Court deemed Petitioner's submission a habeas petition (his seventh), and denied that petition on its merits on February 9, 2004.[3] (I App. 49, 51-52, 86-87.)

---

[3] Prior to Petitioner being granted an eleventh-hour stay of execution in 2004, and being permitted to file his third federal habeas petition in the district court, the California Supreme Court had denied Petitioner's seven habeas petitions, three motions to recall the remittitur issued in his direct appeal, and a petition for writ of mandate. (I App. 45-52.)

On February 6, 2004, Petitioner sought a stay of his execution from the Ninth Circuit, and requested leave to file a third federal habeas petition. On February 7, 2004, Petitioner filed his seventh petition for writ of certiorari in this Court and requested a stay of execution. This Court denied the petition and application for stay on February 9, 2004. (I App. 52; *Cooper*, 540 U.S. 1172.) A three-judge panel of the Ninth Circuit denied Petitioner's application for leave to file a successive petition on February 8, 2004. On February 9, 2004, the Ninth Circuit sua sponte agreed to hear Petitioner's application for leave to file a successive habeas petition *en banc*. (I App. 52; *Cooper v. Woodford*, 358 F.3d 1117 (9th Cir. 2004).

On February 9, 2004, hours before Petitioner's scheduled execution, a majority of an *en banc* panel found that Petitioner had stated a prima facie case for relief as to one habeas claim that justified a stay of execution and granted permission to file a successive habeas petition. *Cooper*, 358 F.3d 1117. The court concluded that the declaration from former CIM Warden Midge Carroll made a prima facie case that law-enforcement authorities had withheld material exculpatory evidence. *Id*, at 1121. Moreover, the Court found that Petitioner made a prima facie showing the information from former Warden Carroll could not have been previously discovered through the exercise of due diligence. The Ninth Circuit expressly noted, in discussing

Petitioner's *Brady*[4] claim, that "Cooper also attaches a sworn declaration of his present counsel stating that Cooper's investigators became aware of the information contained in Warden Carroll's declaration on January 30, 2004, the date the declaration was signed." (I App. 52; II App. 288; *Cooper*, 358 F.3d at 1121.)

On March 19, 2004, the State filed a petition for writ of certiorari in this Court challenging the jurisdiction of the Ninth Circuit to grant authorization to file a successive petition after a three-judge panel has denied authorization. The State's petition was denied on May 17, 2004. (I App. 52.)

Despite the claim of newly-discovered evidence on which the Ninth Circuit issued its eleventh-hour stay of execution and granted Petitioner authorization to file a third federal habeas petition, testimony during the evidentiary hearing on remand to the district court showed that Petitioner's defense had known about the factual basis of his *Brady* claim based on former Warden Carroll's declaration for years before it was presented to the Ninth Circuit in February of 2004.[5] (I App. 212 & n.41.) Also, despite

---

[4] *Brady v. Maryland*, 373 U.S. 83 (1963).

[5] The Ninth Circuit's earlier conclusion that the information from Warden Carroll was both material and exculpatory rested on the belief that if Warden Carroll had testified, and the jury believed her, "the jury would have known that Cooper almost certainly was not wearing 'Pro Ked Dude' shoes." *Cooper*, 358 F.3d at 1122. But Petitioner never contended he was not issued Pro-Keds Dude shoes by the (continued...)

the *en banc* majority's optimistic prediction in February 2004 that "[t]he district court may be in a position to resolve this case very quickly," that became impossible when the Ninth Circuit backed up Petitioner in his demand for mitochondrial DNA testing of blond hairs found in Jessica Ryen's hands and for testing of the presence of the preservative EDTA on a T-shirt that had never been used as evidence against Petitioner in securing his conviction. (I App. 120, 122-123; II App. 294.) After complying with the Ninth Circuit's unnecessary order to test the T-shirt, the district court observed that "over one year after the remand, the process has not been 'quick,' as Petitioner promised." (I App. 123.)

Notwithstanding the State's contention that EDTA testing results were inadmissible under the Federal Rules of Evidence and that the testing itself did not satisfy the standards for reliability established by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993), the district court ordered that the testing be conducted

---

(...continued)
prison; indeed, he had admitted wearing them at the time of his escape. Petitioner's actual claim was that the prosecution contended the Pro-Keds Dude shoe was only available through prisons when it was supposedly readily available at retail stores such as Sears. The only support for Petitioner's claim came from former CIM Warden Carroll, and the hearsay information she imparted was incorrect: Accurate information on this point, *i.e.*, the corporate sales records and testimony of an executive with the company that manufactured and sold the brand and model of shoe, had been presented to Petitioner's jury during trial. (I App. 208-228.) The stay Petitioner obtained in 2004 caused more than five years of additional delay.

as the Ninth Circuit had directed. (I App. 125.) The district court ultimately concluded that EDTA testing did not satisfy the standards for reliability *established* by *Daubert* and the Federal Rules of Evidence. (I App. 140-155.) The district court's ruling was based on findings that: (1) in the only case in which EDTA test results by Dr. Ballard (Petitioner's EDTA expert) were offered into evidence, the court soundly rejected both the credibility of Dr. Ballard and the reliability of EDTA testing in ruling the evidence inadmissible (I App. 145-150); (2) the application of EDTA testing in a forensic context has not been scientifically accepted and has not been subjected to either peer review or publication (I App. 151-152); and (3) there are no standard EDTA levels against which test results can be compared, permitting significant manipulation of the results and preventing definitive conclusions (I App. 152-155). The district court also found, separate and apart from its "serious concerns about the reliability of EDTA testing," that Dr. Ballard's test results did not support Petitioner's claim of tampering. (I App. 156.)

The court-ordered mitochondrial DNA testing of hairs recovered from the hands of Jessica Ryen did not show that someone other than Petitioner committed the murders. The testing confirmed that the hairs most likely came from one or more of the victims, and failed to identify another assailant. These results were consistent with the examination and assessment of the hair evidence performed by Petitioner's expert at the time of trial. The district

court explained that the result of the testing "should not be surprising," given that there was a large amount of blood on the victims and a large amount of hair on the debris-ridden carpet, and that each victim had sustained hatchet wounds to their heads, causing clumps of hair to fall to the ground. (I App. 108-109, 116-117.)

The district court also held extensive evidentiary hearings at which 42 witnesses testified with respect to all issues encompassed in Petitioner's third federal habeas petition. The district court issued a comprehensive 159-page decision addressing each of Petitioner's nine habeas claims. (I App. 2, 32; II App. 437, n.1.)

The three-judge panel of the Ninth Circuit affirmed the district court's denial of Petitioner's third federal habeas petition, noting the tests that Petitioner claimed would establish his innocence "show nothing of the sort." (I App. 2, 32; II App. 437, n.1.) Petitioner's motion for rehearing and for *en banc* rehearing was denied by the Ninth Circuit. (II App. 434.)

It is against this procedural history that Petitioner has filed his tenth Petition in this Court.

ARGUMENT

Petitioner contends certiorari is warranted in this case to: (1) decide whether it violates the Eighth Amendment to execute someone who is actually innocent; (2) provide guidance to lower courts regarding the fact-finding procedures that should be

afforded a petitioner attempting to prove an actual-innocence claim; (3) resolve a split of authority among the circuits over whether the gateway standard for innocence enunciated in *Schlup v. Delo*, 513 U.S. 298, 316 (1995), has been superceded by enactment of 28 U.S.C. § 2244(b); and (4) resolve a split of authority over whether a *Brady* claim in a successor petition is properly subjected to a gateway innocence requirement. (Pet. at 21-38.) Certiorari is not warranted to address the questions raised in the pending Petition. Those questions were not actually reached below, and the Ninth Circuit's decision affirming the district court's denial of relief does not conflict with any decision of this Court or any other court of appeals. Moreover, this case is not an appropriate vehicle to consider the questions presented because they rest on an unfounded factual predicate: that Petitioner is innocent. Further review of Petitioner's highly fact-bound claim is therefore unwarranted.

1. In *Herrera v. Collins*, 506 U.S. 390, 420 (1993), "this Court assumed without deciding that 'in a capital case a truly persuasive demonstration of "actual innocence" made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim.'" *House v. Bell*, 547 U.S. 518, 535 (2006), quoting *Herrera*, 506 U.S. at 417. Petitioner argues that certiorari is warranted for this Court to resolve what it had assumed in Herrera and in its recent remand in *In re Davis*, No. 08-1443, 2009 WL 2486475 (U.S., Aug. 17, 2009).

(Pet. at 21-23.) But Petitioner's suggestion is unavailing because Petitioner is clearly not innocent. Moreover, the district court's and circuit court's treatment of Petitioner's innocence claim was completely faithful to this Court's teachings.[6]

Petitioner suggests otherwise, noting that neither the district court nor the Ninth Circuit had the benefit of this Court's decision in *Davis*, resulting in their failure to apply the "clearly establishes" standard to his freestanding actual-innocence claim. (Pet. at 22.) In *Davis*, this Court remanded the original habeas petition to the district court for the purpose of receiving testimony and making findings of fact concerning whether evidence that could not have been obtained at the time of trial "clearly establishes" Davis's innocence. *In re Davis*, 2009 WL 2486475 at *1. But the decision below is not contrary to this Court's decision in *In re Davis*, which articulates no burden of proof for a freestanding innocence claim. Indeed, as Petitioner concedes, Davis did not even resolve whether such a claim is cognizable on federal habeas. (Pet. at 21.) This Court, by delegating the fact-finding function to the

[6] California permits freestanding innocence claims to be presented on habeas corpus. *See In re Clark*, 5 Cal. 4th 750, 766 (1993). Accordingly, Petitioner's case does not fall within the procedural parameters of the federal habeas remedy for actual innocence that was assumed in *Herrera*, as the State has available avenues to address innocence claims brought by state prisoners. The California Supreme Court heard and denied Petitioner's actual-innocence claim on its merits, and the Governor of California denied executive clemency, prior to Petitioner's scheduled execution in 2004.

federal trial court on an original habeas petition, did not purport to announce the standard of proof a prisoner must meet in order to prevail on a freestanding claim of innocence.[7]

There certainly can be no rationale for imposing a lesser burden of proof for demonstrating innocence in the context of a freestanding innocence claim than this Court requires for a gateway innocence claim. In *Herrera*, this Court observed that a freestanding claim of actual innocence would require "a truly persuasive demonstration" of "actual innocence," and "because of the very disruptive effect that entertaining claims of actual innocence would have on the need for finality in capital cases, and the enormous burden that having to retry cases based on often stale evidence would place on the States, the threshold showing for such an assumed right would necessarily be extraordinarily high." *Herrera*, 506 U.S. at 417.

"[P]risoners asserting innocence as a gateway to defaulted claims must establish that in light of new evidence, 'it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.'" *House*, 547 U.S. at 536-537, quoting *Schlup*, 513 U.S. at 327. As this Court emphasized in *House*, "the *Schlup* standard is

---

[7] A further indication that this Court, by its two-sentence transfer order in *Davis*, did not erect an authoritative standard of proof can be found in the concurring statement of Justice Stevens, joined by Justices Ginsburg and Breyer, which hypothesizes a situation in which "new evidence conclusively and definitively prov[es], beyond any scintilla of doubt," that a prisoner is innocent. *See In re Davis*, 2009 WL 2486475 at *1.

demanding and permits review in only the 'extraordinary' case." *House*, 547 U.S. at 538, quoting *Schlup*, 513 U.S. at 327. Accordingly, the decisions of the Ninth Circuit and district court concluding that Petitioner could not make the requisite showing for a freestanding actual-innocence claim because he could not satisfy either the *Schlup* standard or 28 U.S.C. § 2244(b) are not contrary to the jurisprudence of this Court, or any other circuit court.

This Court has recognized the "unparalleled ability" of DNA testing "both to exonerate the wrongfully convicted and to identify the guilty" and to "provide powerful new evidence unlike anything known before." *District Attorney for Third Judicial District v. Osbourne*, ___ U.S. ___, 129 S. Ct. 2308, 2312, 2316 (2009). Indeed, in this case, the agreed-upon post-conviction DNA testing conducted to allow Petitioner to prove his innocence only further inculpated him and confirmed the overwhelming evidence of his guilt presented in his state-court trial.

Petitioner's innocence claim contrasts sharply with the claim advanced in *House*, which was found to satisfy *Schlup*'s gateway innocence standard. In *House*, there was "no dispute" that House had "presented some new reliable evidence," and that the state had "conceded as much." *House*, 547 U.S. at 537. In direct contravention of evidence presented at trial, DNA testing established that semen on the victim's nightgown and panties came from her husband, not House. The State conceded the point, but argued the new evidence was immaterial.

Id. at 540. Petitioner's case presents the opposite situation faced in *House*, *i.e.*, Petitioner was afforded post-conviction DNA testing and the results *confirmed* his guilt.

As the Ninth Circuit three-judge panel found:

> We agree with the district court's conclusion that all of Cooper's challenges "have come back the same: there is overwhelming evidence that Petitioner is the person guilty of these murders." Order at 15854. Considering all the evidence, new and old, Cooper has not shown that it is more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt. *Schlup*, 513 U.S. at 327, 115 S.Ct. 851; *see House*, 126 S.Ct. at 2076-78 ....

(I App. at 27.)

Whatever standard might be applied, there is no credible evidence that anyone other than Petitioner "chose to slaughter a father, a mother, and two children in the sanctity of the Ryen home, and leave another child barely clinging to life." (I App. 107.) The absurdity of Petitioner's "innocence" hypothesis was recognized by the California Supreme Court in his direct appeal, and nothing that has transpired since has cast any doubt on Petitioner's guilt:

> It is utterly unreasonable to suppose that by coincidence, some hypothetical real

> killer chose this night and this locale to kill; that he entered the [hideout] house just after defendant left to retrieve the murder weapons, leaving the hatchet sheath in the bedroom defendant used; that he returned to the [hideout] house to shower; that he drove the Ryen station wagon in the same direction defendant used on his way to Mexico; and that he happened to wear prison issue tennis shoes like those of defendant, happened to have defendant's blood type, happened to have hair like defendant's, happened to roll cigarettes with the same distinctive prison issued tobacco, and so forth. Defendant sought to discredit or minimize each of these items of evidence, but the sheer volume and consistency of the evidence is overwhelming.

People v. Cooper, 53 Cal. 3d at 800.

Petitioner contends that the forensic evidence and testimony against him have "since been shown to be completely unreliable." (Pet. 9.) Nothing could be further from the truth. Post-conviction DNA testing *confirms* Petitioner's guilt. The post-conviction DNA testing of items identified as forensically significant by Petitioner's expert, Dr. Blake, further inculpated Petitioner by confirming his presence in the Ryen home (where he left his blood), and inside the stolen Ryen station wagon (where he left two cigarette butts). Petitioner has been further incriminated by

the T-shirt recovered from the side of the road about two miles from the Ryen home, which has been found to contain both Petitioner's and his victim's DNA. (I App. 160-165.) Every federal and state court that has considered the evidence has roundly rejected Petitioner's innocence claim.

In urging this Court to grant certiorari, Petitioner highlights the views expressed in Judge Fletcher's dissent. (Pet. at 3, 7, 10, 12, 18, 20-21, 24.) But as Judge Rymer aptly noted in her concurrence to the order denying *en banc* review:

> ... The dissent improperly marshals the facts in the light most favorable to Kevin Cooper, yet the evidence was resolved against Cooper at trial — after he took the stand and testified — and at each step of the post-conviction proceedings. The dissent also approaches the issues as if they were new, yet the same issues have been on the table since day one (except for DNA testing which didn't exist at the time and which has turned out to be inculpatory).... All were known at the time of trial and have been litigated in one forum or another, unfavorably to Cooper, for the last 24 years.

(II App. 435.)

In addition to impermissibly drawing inferences against the judgment (*see House*, 547 U.S. at 538, quoting *Schlup*, 513 U.S. at 330), Judge Fletcher's

dissent ignored critical credibility determinations. Petitioner testified at trial, and his "implausible story about what he did at the [hideout] house and how he left for Mexico" was disbelieved by the jury. As the district court noted, "the prosecution effectively cross-examined Petitioner by pointing out inconsistencies in Petitioner's account and questioning Petitioner's credibility." (I App. 81.) It counts very little that "[f]rom the time of his initial arrest until today, Kevin Cooper has consistently maintained his innocence of the murders for which he has been convicted." (II App. 306.)

Conspicuously absent from Judge Fletcher's dissent is any acknowledgment that the case is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). The California Supreme Court's rejection of Cooper's freestanding actual-innocence claim is not only not unreasonable in any regard, but it is plainly correct. (*See* I App. 168-184; 239.) Even if AEDPA would not affect the disposition of a freestanding claim of actual innocence, an understanding of AEDPA's purpose would nevertheless inform the judiciary's consideration of such a claim. *See Calderon v. Thompson*, 523 U.S. 538, 558 (1998). Thus, whether the standard enunciated in *Schlup* or in 28 U.S.C. § 2244 is used to evaluate Petitioner's innocence claim, it is clear that any showing of actual innocence must be predicated on new and reliable evidence not presented at trial. *See Schlup*, 513 U.S. at 324; *Calderon*, 523 U.S. at 559; 28 U.S.C. § 2244(b). Yet, Judge Fletcher's dissent relies on matters already

presented to the jury over two decades ago.[8] These same matters were also addressed in Petitioner's

---

[8] Judge Fletcher discusses matters that were known to the defense at the time of trial, and which were for the most part presented to the jury. (*See* II App. 312 [valuables not taken from Ryen home], 313 [keys left in stolen station wagon, couple observing car traveling away from Ryen home], 313, 371-381 [statements by Josh Ryen about three men], 314 [multiple-assailant theory based on number of wounds/weapons used], 315-321, 407-412 [third-party culpability theory involving Lee Furrow and destruction of pair of "bloody coveralls" given to a sheriff's deputy by Diana Roper], 321-325 [statements attributed to Kenneth Koon by mental patient Anthony Wisley], 326-328 [third-party culpability theory involving three white male strangers at Canyon Coral Bar night of the murders], 335 [color of Petitioner's prison-issue jacket] 384-386 [testing of drop of blood (A-41)], 331, 387-390 [circumstances of recovery of shoe prints], 334, 390-391 [recovery of tobacco/cigarette-butt evidence], 392-394 [recovery of hatchet sheath and jacket button], 330-332 [information regarding purchase of prison-issued Pro-Ked Dude shoes, including availability in a wholesale catalogue for retailers, and circumstances of issuance of shoes to Petitioner], 412-416 [reference to "blue" shirt in Sheriff's log]; *compare*, I App. 189-192, 196 [third-party culpability evidence at trial *re* three strangers at Canyon Coral Bar], 214-216, 221-222, 224-225 [trial evidence *re* purchases of Pro-Ked Dude shoes] 229 [Josh Ryen's statements], 230 [multiple assailant theory], 231-232 [third-party culpability evidence *re* Lee Furrow], 235-237 [statements attributed to Kenneth Koon by mental patient Anthony Wisley], 242-243 [trial testimony *re* destruction of coveralls], 259-262 [sheriff's logs referencing "blue" shirt provided to defense before trial], 266-267 [testing of drop of blood A-41]; II App. 435 [Josh Ryan's statements, handling of drop of blood A-41, presence of three strangers at Canyon Coral Bar, three white men seen driving on road leading away from Ryen home, Petitioner's shoes and whether they were responsible for incriminating shoe prints, destruction of bloody coveralls linked to Lee Furrow, where sheath found, whose blood on tan T-shirt, cigarette butts in Ryen station wagon, whether there was blue shirt, police incompetence, mishandling of evidence, and chain of custody

(continued...)

direct appeal and in numerous habeas petitions in both state and federal court. "To put Petitioner's innocence claim in perspective, the primary newly discovered evidence pertaining to the T-shirt is that it is stained with Petitioner's blood." (I App. 207.) Further, Petitioner's claim that blood was planted on the T-shirt is not only unfounded,but nonsensical, as it ignores the fact that the T-shirt was never used at trial as evidence against him.

Judge Fletcher's rejection of state- and federal-court factual findings indulges in a theory of tampering even more far-fetched than the theory that Petitioner himself advanced in the state and federal courts. Anyone planting the minute quantity of Petitioner's blood on the T-shirt before Petitioner's state-court trial would have had to be prescient, for the Nobel-Prize-winning science that would reveal the inculpatory nature of that evidence had not yet been developed. Significantly, it was proven in the state court that the portion of the T-shirt that was subsequently discovered to contain Petitioner's and Doug Ryen's DNA had been in the *continuous* custody of the San Diego County Superior Court evidence clerk since the time of trial. (I App. 165-166.) Judge Fletcher theorizes:

> [I]f state actors did plant Cooper's blood on the T-shirt, they likely did so long after trial — after DNA technology became

---

(...continued)
problems].)

> available and after Cooper requested that DNA testing be performed on the T-shirt.

(II App. 338.)

Thus, Judge Fletcher's dissent implies without support that San Diego County Superior Court personnel planted evidence against Petitioner after he was convicted.[9] Like other unfounded allegations in the dissent, this one ignores the participation of Petitioner's experts in pre-trial, trial and post-conviction testing of evidence. Notably, Dr. Blake, Petitioner's designated expert, was involved in the analysis of the evidence pre-trial, during trial, and in the post-conviction nuclear DNA testing (*see* I App. 162, 184, 267, 270); and Dr. Blake has never supported or substantiated any of the implausible accusations of evidence tampering allegations asserted by Petitioner (and reflected in Judge Fletcher's dissent). For these reasons and others ably identified in Judge Rymer's opinion (*see* II App. 434-446), Judge Fletcher's dissent does not support any reason for this Court to grant review.[10]

---

[9] It is unclear whether the dissent's reference to "state actors" extends to the California Department of Justice (DOJ) DNA Laboratory. Such an accusation would be easily refuted by the fact that DOJ DNA Laboratory did not receive Petitioner's blood sample from the San Bernardino Sheriff's Department Crime Laboratory, or the sample of his blood drawn on death row in 2001, until *after* it already typed the evidence items (in the presence of Petitioner's designated expert, Dr. Blake). (I App. 162.)

[10] Judge Fletcher's dissent characterizes the "eyewitness (continued...)

2. Petitioner also argues that certiorari is warranted so this Court can provide guidance to lower courts regarding the fact-finding procedures that should be afforded to a petitioner, and the "nature and extent of evidentiary hearings" at which an actual-innocence claim might be explored. (Pet. at 21, 23-25.) Petitioner does not explain why the existing rules, statutes, and judicial pronouncements are insufficient in that regard. Petitioner's mere disagreement over the district court's evidentiary rulings on discovery and evidentiary matters is not a basis for further review.

The dissent states: "There is no way to say this politely. The district court failed to provide Cooper with a fair hearing and flouted our direction to perform the two tests." (II App. 310.) But, as Judge Rymer makes clear, "[t]he district court did no such thing." (II App. 441.) The district court held a tutorial on EDTA testing and "requested submissions on a variety of testing-related issues which the parties provided after consulting with their experts, participated in numerous hearings and conferences

---

(...continued)
testimony of Josh Ryen" as among "the most important evidence against Cooper at trial." (II App. 238.) Yet the California Supreme Court did not rely on any statements by Josh Ryen when concluding that it was "utterly unreasonable to suppose that by coincidence, some hypothetical real killer chose this night and this locale to kill." *People v. Cooper*, 53 Cal. 3d at 837. Likewise, the district court did not refer to Josh Ryen's statements when detailing the trial-court findings and overwhelming evidence of Petitioner's guilt. (I App. 168-184.) Petitioner's conviction does not rest on the "eyewitness" testimony of eight-year-old Joshua Ryen.

over a three-month period to develop a protocol, ordered the two tests to be conducted, resolved problems that came up during the process, analyzed the results, and issued a thoughtful 159-page ruling that discusses in meticulous detail all aspects of the testing as well as each claim in Cooper's petition." (II App. 441.)

Petitioner claims he was not afforded an opportunity in the district court to prove his innocence, and relies on Judge Fletcher's dissent in support of that contention. (Pet. at 24.) That dissent complains about "unreasonable conditions on the testing" and takes exception with the district court's rulings regarding the admissibility of the EDTA test results. (II App. 310, 338-341.) However, as Judge Rymer notes:

> The district court did the job it was required to do under *Daubert* [], 509 U.S. [at] 589 [ ] — determine whether EDTA testing is scientifically valid. The district court concluded that the analysis by Cooper's expert did not pass muster. There is no evidence that the methodology Cooper's expert espoused has been, or can be, tested. No other scientists regularly perform this kind of testing. There are no industry standards regarding proper testing protocol, and we have no idea how the history of each specimen's exposure to environmental EDTA will affect the sample and, in turn, the testing. There is no 'normal' base level of EDTA. EDTA

> testing has only been offered to courts on two occasions, and in the one proceeding in which it was challenged, Cooper's expert was involved and both his qualification, and his EDTA testing, were rejected as biased and flawed. Thus, the district court appropriately exercised its gate-keeping discretion to exclude EDTA testing as unreliable.

(II App. 441-442.)

As Judge Rymer also points out, Judge Fletcher's dissent ignores the requirement that a district court's findings not be set aside unless clearly erroneous (*Knowles v. Mirzayance*, ___ U.S. ___, 129 S. Ct. 1411, 1419 (2009). Instead, the dissent

> assesses the EDTA evidence from scratch (including evidence that was withdrawn), and substitutes its own findings for those of the district judge — based on charts and graphs and regression analysis that it has crafted. No court, let alone this court on appellate review, may consider evidence that an expert does not stand behind, nor may we reject a district court's findings of fact — informed by the record before that court — by manipulating data in a way that appears better and brighter to us.

(II App. 442-443.)

Petitioner's inability to demonstrate innocence had nothing to do with the district court's application of familiar rules governing discovery and the admissibility of evidence.[11] It is also simply not true that Petitioner has "never been permitted the opportunity to prove his innocence" despite "substantial evidence" he did not murder the Ryens and Christopher Hughes. (Pet. at 21.) Instead, his inability to prove his innocence stems from the fact that he is so plainly guilty. Further review of Petitioner's highly fact-bound case is unwarranted.

3. Petitioner next argues that certiorari should be granted to resolve whether the gateway innocence standard articulated in *Schlup* has been superceded

---

[11] In assailing the district court's rulings, the dissent advances the novel proposition that the district court denied Petitioner's due process rights "to participate when important decisions are made" by not permitting a representative of Petitioner to be present during the selection and preparation of the stain and controls from the T-shirt. (II App. 344-345.) But the district court appointed an expert that both parties agreed was well qualified to select and prepare the controls for the EDTA testing only after Petitioner's expert declined to participate. After three months of proceedings relating to the testing protocol, Petitioner's expert notified the court at the last minute that he would not participate unless the court permitted a testing protocol to be developed independently of the court. (II App. 345.) Due process would not compel any court to accept such a demand by an expert in a third federal habeas proceeding in which the Petitioner could not sustain his burden for being heard on the merits on a single habeas claim, let alone demonstrate entitlement to testing that did not meet the standards for admissibility under Daubert or the Federal Rules of Evidence. *See, e.g., Medina v. California*, 505 U.S. 437, 445-446 (1992); *District Attorney's Office for the Third Judicial District v. Osborne*, 129 S. Ct. at 2319-2320.

for successive habeas petitions by 28 U.S.C. § 2244(b). (Pet. at 25-31.) But this question is not implicated in these proceedings. It was not necessary for the district court or the circuit court to determine whether *Schlup* or § 2244(b) controlled Petitioner's gateway innocence claim, because he could not meet either standard. In addition, all of Petitioner's habeas claims in his successive petition were heard on the merits; so further review by this Court of the legal question Petitioner identifies would not affect the outcome of Petitioner's case.

Petitioner suggests that certiorari be granted to resolve an alleged conflict among the circuits regarding the controlling gateway innocence standard for successive habeas claims. (Pet. at 25-31.) Petitioner says that the Eleventh Circuit has concluded that the *Schlup* standard has been superceded by § 2244(b). (Pet. at 27 [citing *Jordan v. Secretary of Dept. of Corrections*, 485 F.3d 1351, 1359 (11th Cir. 2007)].) But the Eleventh Circuit merely held that it could not ignore the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), and therefore had to apply 28 U.S.C. § 2244(b) to a coerced confession claim. *Jordan*, 485 F.3d at 1359. Nothing in *Jordan* conflicts with Petitioner's case, in which both the *Schlup* standard and § 2244(b) were applied to successive petition claims. The same is true for the Third Circuit case cited by Petitioner, where the court found the petitioner could not meet the requirements of § 2244(b) or *Schlup*. (*See* Pet. at 27, citing *Goldblum v. Klem*, 510 F.3d 204, 205 (3rd Cir.

2007).) Petitioner also argues that courts have conflated the two standards such that it is difficult to know what standard is being applied. (Pet. at 27.) But in the one case Petitioner cites in his effort to illustrate that state of affairs, neither *Schlup* nor § 2244(b) could be met, and thus successive *Brady* claims could not be addressed on the merits. *Lott v. Bagley*, 569 F.3d 547, 547 (6th Cir. 2008). Accordingly, Petitioner has not shown that this case implicates any conflict among the circuits warranting a grant of certiorari.

4. Petitioner next argues that certiorari is warranted to provide guidance on whether a *Brady* claim presented in a successor petition requires any gateway showing of innocence at all. Petitioner reasons that no showing more onerous than that required for relief for a *Brady* claim is appropriate. (Pet. at 33.) But cases from the Ninth and Tenth Circuits where the question was never reached do not "conflict" with those cases from the Fourth and Eleventh Circuits in which § 2244(b) was applied to *Brady* claims. (Pet. at 35-36, citing *Evans v. Smith*, 220 F.3d 306 (4th Cir. 2000); *Tompkins v. Secretary, Department of Corrections*, 557 F.3d 1257 (11th Cir. 2009).) Whether successive *Brady* claims are exempt from gateway innocence requirements was not reached below, so the decision by the Ninth Circuit also creates no conflict. Indeed, Petitioner's successive *Brady* claims were heard on the merits notwithstanding his inability to meet either the *Schlup* standard or the requirements of § 2244(b).

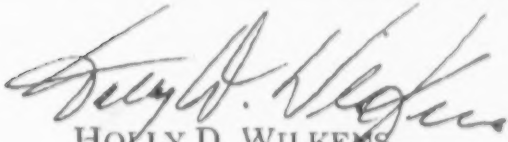
CONCLUSION

The Petition for Writ of Certiorari should be denied.

Dated: October 27, 2009

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of California
DONALD E. DENICOLA
Deputy State Solicitor General
DANE R. GILLETTE
Chief Assistant Attorney General
GARY W. SCHONS
Senior Assistant Attorney General
RONALD S. MATTHIAS
Senior Assistant Attorney General



HOLLY D. WILKENS
Supervising Deputy Attorney General
Counsel of Record

Counsel for Respondent

HDW:sm
SD2009702266
70221072.doc